IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-279

MAGNUS PETROLEUM COMPANY, INC. and MARPAT CORPORATION, *Petitioners*

v.

SKELLY OIL COMPANY, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Under § 3 of the Clayton Act, may a "condition, agreement or understanding" to "not use or deal in the goods . . . of a competitor" be inferred from an eight-year course of dealing where (a) a written franchise sales agreement required purchase and sale of specified minimum quantities; (b) the quantities specified consistently amounted to less than 60-80% of the buyer's total requirements; and (c) the buyer regularly purchased 30-50% of its requirements from competitors of the seller?

2. Can a violation of § 3 of the Sherman Act or § 3 of the Clayton Act be established without definition of a relevant geographic market and without proof that Competition may be (Clayton Act) or is (Sherman Act) substantially lessened in that market by reason of the allegedly violative conduct?

STATEMENT OF THE CASE

Skelly Oil Company

Based in Tulsa, Oklahoma, Skelly Oil Company sells petroleum products, including gasoline and heating oil, in 17 states including Wisconsin (Ex. 422). It sells to wholesalers or "jobbers" (like petitioner Magnus Petroleum Company) and also directly to retail service stations some of which Skelly owns and leases to dealers. From 1969 through 1975 Skelly's share of the U.S. market for gasoline ranged from 0.60% to 0.71% (Ex. 422). During the same years, Skelly had approximately 2% of the market for gasoline in the state of Wisconsin (Tr. 687-88, Ex. 420, 421).

Before 1963, when it purchased a bulk plant and three service stations in Sheboygan and one in nearby Elkhart Lake, Skelly had no operations in the Sheboygan, Wisconsin area (Tr. 611-615). Like many oil companies in the 1960's (Tr. 97, 216), Skelly had a "jobber acquisition" program to expand its market share in Wisconsin (Tr. 611-612). By 1963, Magnus Petroleum Company ("Magnus") had become a successful jobber of petroleum products in the Sheboygan area, operating "bulk plant" storage facilities as well as a number of service stations. Skelly sought Magnus' patronage.

Franchise Sales Agreements (1964-1966)

On February 29, 1964, Magnus and Skelly signed a "Franchise Sales Agreement" (Ex. 175), by which Magnus agreed to buy and Skelly agreed to sell and deliver to Magnus specified annual minimum quantities of gasoline. The "primary term" of this Agreement was March 1, 1964 to February 28, 1969.[1] The annual minimum quantity of gasoline specified in the Franchise Sales Agreement was 810,000 gallons. The parties signed a new Franchise Sales Agreement (Ex. 175) effective March 1, 1965 after Magnus incorporated; its expiration date and purchase obligations remained the same. This was replaced on March 1, 1966 by another Franchise Sales Agreement (Ex. 175), running to February 28, 1971. The specified annual quantity of gasoline was reduced from 810,000 to 701,-000 gallons. Other provisions remained the same.

The minimum purchase obligation inserted in the first Franchise Sales Agreement was an estimate of Magnus' actual annual requirement for gasoline (Tr. 406-407).[2] Magnus did not object to the quantities specified (Tr. 220-222). He "thought it was perfectly reasonable that Skelly be obligated to deliver to [him]

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[1] Either party could terminate upon 60 days written notice at the end of the five-year "primary term" or as of any "anniversary date" (March 1 of each year) thereafter, or upon 10 days written notice for violation of the agreement by the other party.

[2] The reason for the annual requirement was fully explained at trial. Skelly "[didn't] want to write a franchise for a million gallons and the jobber a year later buy 500,000 gallons." (Tr. 407). Having obligated itself to deliver the quantity specified, Skelly had to arrange for delivery of that quantity to a terminal in Wisconsin; if a jobber purchased less than contracted for, Skelly would have excess product available at the terminal. At least before 1972, this created "a serious problem." (Tr. 1079).

the number of gallons of gasoline specified," and that he "be obligated to purchase from Skelly the quantities specified . . ." (Tr. 223).

In 1964, Magnus bought and sold 840,000 gallons[3] of gasoline (with 810,000 the specified minimum). Although in 1965 Magnus' volume jumped to 1,057,000 gallons, the March 1, 1966 Franchise Sales Agreement dropped the annual minimum purchase obligation to 701,000 (Ex. 175). Magnus' actual requirements continued to range much higher than that, from 996,000 gallons (in 1970) to 1,895,000 (in 1972). Thus, although the first minimum set apparently bore some relation to estimated requirements, thereafter no such relationship existed. From 1964 through 1971 the highest percentage of its total requirements which Magnus purchased from Skelly was 75.9% (1969), with only 54.3% and 39.3% purchased from Skelly in 1968 and 1970, respectively (Ex. 418).[4] Magnus purchased ". . . very substantial amounts from other suppliers" (Tr. 223-225), sometimes because it was "cheaper" (Tr. 232).

Service Station Financing Program

In the decade 1960-1970, many oil companies offered service station financing programs to jobbers (or prospective jobbers) in order to increase the number of retail outlets handling their products (Tr. 217-218). Skelly offered a jobber financing program in 1964. Mr.

[3] The gallonages referred to in this paragraph were tabulated in Ex. 418, which is appended to this Brief.

[4] Not even the substantially lower contractual minimums were enforced. In all but four years from 1964 through 1975 Magnus failed to purchase the minimum quantities specified by the Franchise Sales Agreement (Ex. 418, Tr. 235).

Magnus found this program attractive (Tr. 216-217), and Skelly assisted him in financing three Sheboygan service stations, one in 1964 and two in 1966. The amounts loaned were $44,200, $65,000 and $41,500 (respectively). In these transactions a bank (Skelly itself in one case) loaned Marpat Corporation[5] the money in exchange for Marpat's promissory note, payable over 15 years at a favorable rate of interest (Tr. 616). Marpat then leased the station to Skelly for a term of 15 years, with the monthly rent equal to the amortization payments on the note. Marpat assigned the rents due it from Skelly under that "base lease" to the lender as security for the note. Skelly then subleased the station to Magnus for a term of 15 years at the same monthly rent.[6] Thus Skelly's payment to Marpat of rent under the base lease (which was non-cancellable except with the consent of the lender) secured payment of Marpat's promissory note (Exs. 176, 177 and 178).

[5] Magnus was the petroleum product distributing corporation. Petitioner Marpat Corporation ("Marpat") was a holding company formed to purchase and lease real estate and equipment.

[6] The subleases had minimum gallonage requirements of 100,000 per year per station, which did not apply if Skelly cancelled the Franchise Sales Agreement. Actual annual gallonage per station per year (without regard to supplier) averaged approximately 187,500 in 1973 (Tr. 239). Mr. Magnus recalled no instance "of any representative of Skelly complaining or bringing to [his] attention the fact that [he] had failed to purchase the minimum . . ."; that was "never an issue," although there were years in which 100,000 "Skelly" gallons were not put through the stations (Tr. 235-236). In fact, these requirements were unenforceable because gasoline was commingled in the bulk plant (Tr. 242-243). No one could tell how many Skelly gallons were actually sold through each station because all gasoline purchased by Magnus from all suppliers was deposited and mixed in a bulk plant and taken from there to the stations. (*Id.*)

Termination of the Franchise

Almost from its inception, the franchise was strained by Magnus' inability to pay when it was supposed to pay for petroleum products delivered (Tr. 246). In 1966, Magnus suffered a loss as a result of its operation of a liquor store business (Tr. 247). Magnus' bank "extended no further credit" and cut the existing line in half (Tr. 247). This "completely damaged [Magnus'] operating capital." (Tr. 248). Magnus "needed that higher credit limit desperately to operate," and, from then on, working capital was "tight" "most of the time." (Tr. 248). It was difficult for Magnus to pay its bills at all (Tr. 248). This resulted in protracted disputes over slow payment and sometimes non-payment of the various accounts involved, and over Skelly's consequently restrictive credit policies.

Unable to resolve these problems, Skelly noticed termination of the franchise effective February 28, 1971 (Ex. 69), but Magnus promised to reform and the franchise was reinstated on a month-to-month basis (Ex. 70, Tr. 1088). The situation changed only briefly. Two years later, "because of severe credit problems,"[7] Skelly gave Magnus another notice of franchise termination, effective February 28, 1973 (Tr. 191). Skelly nevertheless continued to supply Magnus with petroleum products under the 1973 federal voluntary allocation program first established by federal legislation[8] on February 1, 1974 (Tr. 191-193, 279-280, 291-293).

[7] Tr. 1089; App. 8a.

[8] Emergency Petroleum Allocation Act of 1973 § 4, 15 U.S.C.A. § 753 (1977).

Proceedings Below

This suit was commenced on July 3, 1973. The complaint alleged that Skelly violated the antitrust laws by refusing to permit a cancellation of the "base leases," as a result of which Magnus was allegedly forced in 1970 to forego an opportunity to become a Sun Oil Company jobber in Sheboygan and the Oshkosh-Fond du Lac, Wisconsin area, and to acquire the Jackson Oil Company, another jobbership in a nearby Wisconsin community (Complaint ¶ 19). That was the theory on which the case was tried, beginning September 20, 1976.

Skelly moved for judgment notwithstanding the jury's general verdict ($185,000, before trebling) or, in the alternative, for a new trial. The district court denied the motion. 446 F.Supp. 874 (E.D. Wis. 1978). Skelly appealed, urging four points.

First, it was undisputed that over the eight-year period involved Magnus purchased significant quantities of gasoline from Skelly's competitors,[9] without any attempt on Skelly's part to enforce purchase of the minimum quantities specified in the Franchise Sales Agreement and subleases (let alone Magnus' total requirements). The district court held that the jury could have inferred an exclusive dealing condition in violation of § 3 of the Clayton Act from testimony that Skelly sales personnel urged Magnus not to buy gasoline from other suppliers,[10] and from the fact that in

[9] See Exhibit 418, appended to this Brief.

[10] There was concern in 1970 that Magnus was buying most of its gasoline from suppliers other than Skelly (Ex. 325, Tr. 149-152, 1077-1080). In fact during that year Magnus purchased only 39.3 percent of its gasoline requirements from Skelly (Ex. 418). In

one year, 1972, Magnus bought substantially all its gasoline from Skelly. (App. 19a-22a).

The court of appeals disagreed. "Because the agreements contained no exclusive dealing clause and did not require plaintiffs to purchase any amounts of gasoline that even approached their requirements, they did not violate § 3 of the Clayton Act." (App. 7a). The court further held that no illegal course of conduct was shown under § 3 of the Clayton Act "because the quantity specified in the agreements amounted to less than 60-80 per cent of plaintiffs' total requirements and plaintiffs regularly purchased 30-50 per cent of their requirements from competitors of the seller." (App. 8a). The fact that plaintiffs bought only from Skelly in *1972* the court held irrelevant, because "their lawsuit is predicated on their *1970-1971* inability to become a Sun distributor and to purchase Jackson Oil Company." (App. 8a, emphasis supplied).[11]

October and November, 1970, Magnus purchased no gasoline at all from Skelly for a period of approximately 58 days (Ex. 386, Tr. 1084-1085). This concerned Skelly for several reasons. First, it did not seem fair to Skelly that Magnus was buying gasoline from other suppliers while it still owed Skelly money for gasoline bought earlier from Skelly (Tr. 1079). Second, it created an oversupply situation at the teminal (Tr. 1079). Third, it meant that Skelly had to extend credit (through credit card purchases) on some other oil company's product (Tr. 1079-1080). Fourth, it resulted in other companies' gasoline being "hauled" by Magnus and sold at retail through the Skelly-owned stations in Sheboygan (Tr. 1080). Last, it resulted in Skelly giving Magnus price discounts (for retail "price protection") on gasoline which Skelly hadn't sold to Magnus (Tr. 626-627, 1072-1077).

[11] The court of appeals also observed: "It would seem especially anomalous that Skelly should terminate the relationship entirely in February 1973 immediately after it had accomplished its asserted goal of requiring Magnus to purchase virtually exclusively from Skelly. Its action in doing so supports the inference that both the 1973 and the 1971 terminations were on account of plaintiffs' credit difficulties." (App. 9a, note 15).

Second, petitioners did not attempt to define a relevant market and offered no testimony relating to market foreclosure or economic effects. Skelly urged that neither § 1 of the Sherman Act (in a non-per se case) nor § 3 of the Clayton Act could be violated without specific analysis of economic effect in a relevant market. The district court read *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) as dispensing with specific evidence of market foreclosure under § 3 of the Clayton Act (App. 22a-23a), and found "evidence from which the jury could have concluded that the object of the financing arrangements was to restrain trade" (App. 25a), which the court thought was enough to violate § 1 of the Sherman Act. (*Id.*).

The court of appeals rejected that interpretation of *Lessig*. It said, "the case law is clear that to recover [the plaintiff purchaser] must show a potential foreclosure of competition to the competitors of the seller" (App. 10a),[12] observing that the plaintiff in *Lessig* had established a relevant market and the percentage of competition foreclosed by the arrangements there in question (App. 11a). In the court of appeals, petitioners pursued arguments with regard to three different markets, but the court found the evidence "insufficient to support an inference that competition among Skelly's competitors could have been significantly impaired in any of them." (App. 11a-14a). Thus it concluded that petitioners' Clayton Act claim also failed

[12] See argument at pp. 17-25, *infra*.

on a second ground, for lack of proof of any market foreclosure "the effect of which may be to substantially lessen competition." It found petitioners' Sherman Act claim "fatally lacking" on the same ground for without proof of market foreclosure the restraint could not be held unreasonable. (App. 14a-15a).

Skelly urged two other grounds for judgment *n.o.v.* which the court of appeals did not reach because it concluded that there was no violation of either statute involved.

First, Skelly contended that no violation of the antitrust law by it caused Magnus in 1970 to lose any business opportunities. The district court held that the jury could have inferred causation, despite uncontroverted facts that (a) in 1970 no request was made of Skelly to cancel the leases; (b) nothing in Skelly's arrangements with Magnus precluded Magnus from becoming the Sun Oil Company jobber in Fond du Lac and Oshkosh—it was Sun Oil Company's policy not to sell petroleum products anywhere to a jobber who did some business with another oil company; and (c) no Skelly practice or policy played any role in Magnus' aborted purchase of the Jackson Oil Company's assets (App. 28a-30a).

Second, Skelly argued that proof of damages for violation of the antitrust laws must consist of more than rough estimates of potential profit based on unreliable and, with respect to the Sun Oil Company business, hearsay information. The district court concluded that the damage calculations were not so speculative as to preclude consideration by the jury. It held that Exhibit 145 (on which plaintiffs based the Sun profit calculations) was hearsay admissible under the business record exception (App. 30a-31a).

Respondent does not believe that these questions (which the court of appeals did not reach) are either necessary or proper subjects of a cross-petition for certiorari at this stage of the litigation. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *United States* v. *Nobles*, 422 U.S. 225, 241-242, n.16 (1975); *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226-227 n.2 (1974); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 525 (1973). See generally, 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction*, § 4004 (1977) [hereinafter cited as "Wright & Miller"]; Robert L. Stern and Eugene Gressman, *Supreme Court Practice*, pp. 477-487 (5th ed. 1978). They should be addressed first by the court of appeals in the event this Court grants the writ and reverses the court of appeals. *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 181-182 (1976); *Wood* v. *Strickland*, 420 U.S. 308, 326-327 (1975); *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 n.6 (1969); *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 468 (1947); *United States* v. *Ballard*, 322 U.S. 78, 88 (1944). See generally, 17 Wright & Miller, § 4036, at pp. 27-36 (1977); Stern and Gressman, *id.*

ARGUMENT

I.

The Controlling Decisions Of This Court And All Circuit And District Court Decisions On Point Support The Court Of Appeals' Conclusion That For Purposes Of § 3 Of The Clayton Act There Was Insufficient Evidence Of A Condition, Agreement Or Understanding That Magnus Not Use Or Deal In The Goods Of Competitors Of Skelly.

The first element requisite to establish substantive liability under § 3 of the Clayton Act is a sale or con-

tract of sale on the condition, agreement or understanding that the purchaser not use or deal in the goods of the seller's competitors. *Standard Oil Co.* v. *United States,* 337 U.S. 293. 298 (1949); *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961).

A contract to buy a definite quantity of product over a specified period of time, which does not contain a "requirements" or "exclusive dealing" clause, is not proscribed by § 3 of the Clayton Act. *Tampa Electric Co.* v. *Nashville Coal Co.,* 276 F.2d 766, 771 (6th Cir. 1960), rev'd on other grounds, 365 U.S. 320 (1961); *United States* v. *Standard Oil Co.,* 78 F.Supp. 850, 867 (S.D. Cal. 1948).[13] Accordingly, no express provision of the Franchise Sales Agreement or subleases offends § 3.

[13] The latter case cited is the district court decision that was affirmed by *Standard Oil Co.* v. *United States,* 337 U.S. 293 (1949). In a passage frequently quoted, the district court distinguished as follows between total requirements contracts and contracts to buy a definite quantity:

> When a dealer agrees to take a specific amount of a product, there is the likelihood that *he may,* in case of failure of the supplier to comply with the agreement, or unexpected shortages or increased demands, or a desire to anticipate such shortages or demands, by overstocking,—seek competitive products. There is thus a possibility of access by competitors to the particular outlets. (Emphasis in original.)
>
> Under the "requirements" contracts, the chance is completely cut off. Briefly stated, without a "requirements" contract, competitors may, in time, induce dealers to handle their products. With a contract, they never can.
>
> There is *opportunity to deal with the competitors,* and, hence, possibility,—nay, probability, of freedom of action, when there is no restrictive contract. (Emphasis supplied.) 78 F. Supp. at 867.

Magnus in this case realized the "opportunity to deal with the competitors."

The illegal condition or understanding might also be found in "an extrinsic course of conduct." *McElhenney Co.* v. *Western Auto Supply Co.,* 269 F.2d 332, 338 (4th Cir. 1959). But to prove such a course of conduct (absent express agreement), the plaintiff must prove that an exclusive dealing arrangement actually functioned. In *McElhenney Co.* v. *Western Auto Supply Co., supra,* the leading decision on this point, the Fourth Circuit held that a complaint alleging violation of § 3 of the Clayton Act was properly dismissed for failure to state a claim upon which relief can be granted because during the period when the alleged understanding was in effect, the retailers actually handled competitive articles:

> The complaint itself makes clear that the plaintiffs during the period when the asserted understanding was in effect actually handled competitive articles. 269 F.2d at 338.

Accord, Davis v. *Marathon Oil Co.,* 528 F.2d 395 6th Cir. 1975); *Petroleum for Contractors, Inc.* v. *Mobil Oil Corp.,* 1978-2 CCH Trade Cases ¶ 62, 151 at 75,080-81 (S.D.N.Y. 1978). See *Timken Roller Bearing Co.* v. *F.T.C.,* 299 F.2d 839 (6th Cir.), *cert. denied,* 371 U.S. 861 (1962).

There is undisputed evidence that under the Franchise Sales Agreements, subleases and financing agreements, Magnus purchased gasoline, to the extent of 46.4% of its requirements in 1971, 60.7% in 1970 and 45.7% in 1968, from competitors of Skelly (Ex. 418). Mr. Magnus testified that from 1964 through 1971 his firm purchased gasoline in "very substantial amounts" from other suppliers, including Clark Oil, Ashland, Empire Petroleum, Triangle and Marathon. (Tr. 223-

224). Even if Magnus had purchased from Skelly all the quantities specified in the Franchise Sales Agreements, competitors of Skelly had access to no less than 25% of Magnus' requirements in every year. Mr. Magnus himself made no objection to the quantities specified in the contracts; he thought they were "reasonable." (Tr. 222-223). Magnus on occasion bought from other suppliers because it was "cheaper" than buying from Skelly (Tr. 232). Magnus was actually benefiting from price competition between Skelly and other suppliers.

In these circumstances, as the court of appeals held, there can be no violation of § 3 of the Clayton Act for dealing exclusively. Petitioners cite no case the holding of which would dictate a contrary result.

Petitioners' only suggested basis for certiorari on this ground of reversal is that the court of appeals "failed to take into consideration the vital differentiation between Magnus' continuing freedom to purchase unbranded gasoline on the 'spot' market, and Magnus' lack of freedom to purchase branded product under a contemporaneous franchise with any branded competitor of Skelly." (Petition at p. 19). Petitioners' theory is that "[e]xclusive dealing may still be factually found to exist when the franchisee's branded product requirements are confined to franchisor's branded product even though he is not precluded from purchasing nonbranded product on the open market." (*Id.*, heading 3). By "branded" gasoline petitioners apparently mean gasoline sold by a company which owns a tradename or trademark under which the gasoline is ultimately sold at retail (e.g., "Skelly," "Amoco," "Shell"). This theory was not advanced in

the courts below, and for that reason alone this Court should be reluctant to consider it. *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977); *Miree* v. *DeKalb Co.,* 433 U.S. 25 (1977); *Tennessee* v. *Dunlap,* 426 U.S. 312 (1976); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970); *United States* v. *Nobles, supra.* See generally, 17 Wright & Miller § 4036, at pp. 26-29.

Nor does the theory have any basis in the record. Nothing in the Franchise Sales Agreement or leases differentiated between "branded" and "unbranded" gasoline. Nor was there any evidence that Skelly in its dealings with Magnus ever made any such distinction in urging him to buy more gasoline from Skelly.

Logically, the question whether there was an exclusive dealing arrangement for purposes of § 3 should be determined in light of the statutory purpose to protect competition. In that light, the distinction between "unbranded" and "branded" gasoline is meaningless because the only relevant product market is gasoline. That a tradename or trademark is associated with a product does not make it a separate product market. As noted by the court in *Mullis* v. *Arco Petroleum Corp.,* 502 F.2d 290, 298-299 (7th Cir. 1974):

> The fact that an injury to a particular competitor may be unusually severe is not a justification for adopting a market definition which only considers the particular product line [i.e., the Arco brand line of products] which he previously sold or purchased. For in Sherman Act litigation we must adhere to the admonition that the statute is concerned 'with the protection of *competition,* not competitors.' [Citing *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962)]. And whether the competition is more intense on the seller's or the buyer's side of the market, we may not arbitrarily

> segregate one brand from equally acceptable substitutes in order to protect a particular competitor from injury.

Accord, United States v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 394-404 (1956) (cross-elasticity of demand defines relevant product market); *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365, 376 (1967) (in analyzing effect of vertical restraints on competition, "competitive products" in relevant market is presumed to include physically similar products of other brands); *Federal Trade Commission* v. *Borden Co.,* 383 U.S. 637, 644-646, 659-660 (1966) (branded and unbranded milk held to constitute "goods of like grade and quality" for the purposes of § 2a of the Robinson-Patman Act). Since it had no effect on competition in the relevant market, it is irrelevant that Magnus did not or could not (because other oil companies were unwilling) sell the gasoline he purchased from Skelly's competitors under their tradenames.[14] On this point there is no conflict with this Court's decisions or between circuits; nor does it present "an important question of federal law" (Sup. Ct. R. 20).

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[14] *Petitioners cite Lee-Moore Oil Co.* v. *Union Oil Co.,* —— F.2d ——, 1979-1 CCH Trade Cases ¶ 62,651 at pp. 77,690-91 (4th Cir. 1979) for the proposition that the distinction between branded and unbranded gasoline "has recently received judicial cognizance in the context of recoverable damages." Even in that context the distinction was meaningless. After an unlawful contract termination, the plaintiff distributor bought unbranded as well as branded gasoline elsewhere at slightly higher prices, and was allowed to recover as antitrust damage the difference between the price of that gasoline and the terminated contract price. The Fourth Circuit specifically observed that any distinction between "branded" and "unbranded" gasoline was meaningless in the context of relevant product market definition. *Lee-Moore Oil Co.* v. *Union Oil Co., supra* at p. 77,691, citing *Mullis* v. *Arco Petroleum Corp.,* 502 F.2d 290 (7th Cir. 1974).

II.

Petitioners' Suggestion That The Standards For Proving Anti-Competitive Effect In Antitrust Cases Should Be Reduced To A More Affordable Level Disregards The Economic Rationale Underlying The Antitrust Laws.

The court of appeals held that "[e]ven if the franchise sales agreements violated the forepart of § 3 of the Clayton Act, they would not be illegal unless they tended to substantially foreclose competition between Skelly and its competitors in the relevant market." (App. 9a). That is correct. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 298 (1949). "[A] case under Section 3 of the Clayton Act . . . must have *specific* evidence of market foreclosure in a *relevant market* in which the exclusive contracts exist." *L. G. Balfour Co.* v. *F.T.C.,* 442 F.2d 1, 19 (7th Cir. 1971) (emphasis added). *Accord, Lupi* v. *Stella D'Oro Biscuit Co.,* 586 F.2d 1163, 1172 (7th Cir. 1978); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.,* 512 F.2d 1264 (9th Cir. 1975). In *Tampa Electric, supra,* 365 U.S. at 327-329, this Court prescribed a three-step analysis for substantiality of probable market effect under § 3 of the Clayton Act:

> (1) Identification of the market affected by the restraint;
>
> (2) Determination of the percentage of the relevant market which is affected by the restraint;
>
> (3) Whether the percentage of the market affected, when weighed in connection with a variety of economic factors, is such that the agreement probably has the effect of substantially lessening competition.

Without a market definition there can be no measure of substantiality or analysis of probability of effect, since there is no frame of reference. "[A]n antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 53 n.21 (1977).

Except in cases of *"per se"* illegality, the determination of "unreasonableness" under Section 1 of the Sherman Act requires the same economic analysis of market structure and impact. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975); *Gough* v. *Rossmoor Corp.,* 585 F.2d 381, 385 (9th Cir. 1978) ("[m]arket definition is essential"); *Lee Klinger Volkswagen* v. *Chrysler Corp.,* 583 F.2d 910, 914-915 n.6 (7th Cir. 1978) ("there must be proof identifying the relevant market and showing the effect thereon"); *Dougherty* v. *Continental Oil Co.,* 579 F.2d 954 (5th Cir. 1978).

Petitioners at trial made no attempt to define a relevant geographic market and prove the percentage of competition foreclosed in that market. The court of appeals thus held, correctly, that they failed to prove a violation of the antitrust laws.

Petitioners ask this Court to consider the court of appeals' facially obvious application of a familiar antitrust principle on two, mutually conflicting, grounds. First, they suggest that expert testimony asserting the existence (not the economic effect) of certain "industry-wide" practices should suffice, since economic data is expensive and difficult or impossible to obtain (Petition, pp. 15-18, point 1). This suggests that the relevant geographic market is national. But then they argue that the relevant market should be limited to the "community" of "greater Sheboygan." (Petition, pp. 20-22). Both these suggestions were analyzed and rejected by the court of appeals for lack of record support and stark inconsistency with established antitrust jurisprudence. (App. 11a-14a).

Clearly the level of competition affected is that affected by the vice inhering in an exclusive dealing arrangement: the market in which the arrangement excludes the supplier's competitors from the purchaser's business. *Tampa Electric, supra,* 365 U.S. at 327;[15] *Southern Concrete Co.* v. *United States Steel Corp.,* 535 F.2d 313, 318 (5th Cir. 1976) *cert. denied,* 429 U.S. 1096 (1977). Competitors of Skelly were allegedly restrained from access to Magnus' business by Skelly's contractual arrangements, and it is competition between Skelly's competitors for jobbers' business that is the pertinent level of competition.

The only evidence specifically relating to a relevant market and economic effect in that market was Skelly's economist's uncontradicted testimony concerning the Wisconsin market. He explained that the market relevant to Magnus' Skelly franchise was a thirteen-county area within a radius of 62 miles from Sheboygan. (Tr. 688-691, 698, 711, Exs. 411, 419). This was "the market in which the particular jobber [Magnus] could pur-

[15] The pertinent language in *Tampa* is quoted as follows at page 20 of the Petition:

> ". . . [T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the *purchaser* can practicably turn for supplies." (Petitioners' emphasis.)

Petitioners' implication that "purchaser" means the ultimate retail consumer is patently wrong. There has never been any doubt that the "purchaser" referred to is the purchaser from the seller whose sale or contract for sale allegedly violates § 3. The market area to which some other purchaser turns for supplies at another point in the distribution chain is economically irrelevant.

chase product and resell it profitably . . ." (Tr. 699). Market definition was based principally on an analysis of the area in which Magnus actually purchased product over the period of time in question (Tr. 698-699, Exs. 411, 419).[16] Having determined the volume of gasoline sales in the thirteen-county area (Tr. 701-710), the economist determined the percentages of that market held by Magnus during 1964-1975. (Tr. 710-713). Magnus had substantially less than one half of 1% of the relevant market in each year. The economist concluded that "this approaches what the economists call the 'perfect competitor'; in other words, it was such a small participant that it couldn't in any way influence the market." (Tr. 714).[17]

The court of appeals agreed. (App. 14a, 15a). Even if "greater Sheboygan" (the parameters of which are not defined of record) were the relevant geographic market, there was no evidence of foreclosure in that

[16] The market defined is substantially smaller than the relevant market criterion of 100 miles established by the Federal Trade Commission for the petroleum jobber industry. (Tr. 700).

[17] In addition to the showing of *de minimis* market effects in the relevant Wisconsin market, Skelly's economist's testimony also showed that there were many buyers with which Skelly's competitors could have dealt (Tr. 718-720) and that competition had actually flourished in Wisconsin. Exhibit 420 showed that between 1964 and 1974 the five leading gasoline suppliers in Wisconsin lost market shares, middle-sized and smaller competitors increased their market shares, and some seven new competitors entered the market. Concentration of the market was significantly diluted and competition during that period was "substantial," "intense," and "sustained." (Tr. 720-723). There was no evidence to the contrary. The economist's undisputed conclusion was thus compelled:

> . . . the imperceptible percentage of the market that was accounted for by the Skelly-Magnus operation makes it logically impossible for anything that was done by Skelly or Magnus at this point in time in this market to have any effect on competition. (Tr. 724).

market. To the contrary, as the court of appeals observed, "[t]he evidence does not establish that Skelly's competitors were foreclosed even from the greater Sheboygan area since (1) as indicated, plaintiffs bought a significant portion of their requirements from Skelly's competitors, (2) only three of the ten stations supplied by plaintiffs were subject to the financing agreements, and (3) there was evidence of vigorous inter-brand competition in Sheboygan." (App. 13a-14a).

As for petitioners' reference to "industry-wide practice," no evidence was offered concerning "exclusive dealing" by Skelly's competitors. There was generalized testimony by a former Shell Oil Company manager that "dual branding" (selling gasoline under competing tradenames, or selling gasoline purchased from one oil company under another's tradename) was frowned upon in the industry, and that many oil companies had financing arrangements similar to Skelly's. (Tr. 181-184, 341-343, 358). There was no evidence, however of the contents of any particular oil company's arrangements, and no evidence whatsoever of any express or implied exclusive dealing requirement imposed by any such company.[18]

Even if "industry-wide" practices were established, the evidence concerning them was so vague as to pre-

[18] Quite apart from the vague and non-specific nature of this testimony, petitioners' evidence was not competent to prove even the most amorphous "industry-wide practice." They rely upon testimony (Tr. 341-343, 358) that the Skelly-Magnus franchise agreements were representative of industry-wide practice, and that the coercion inherent there is derived from an industry-wide policy against dual distribution. Important as they thought such a showing was to their case, however, they never introduced into evidence even one of the financing agreements which were supposed to abound in the industry. Their "industry" witness failed to testify to a single instance in which the putative policy against dual dis-

clude their consideration for purposes of such economic analysis in this case. The only testimony that such arrangements affected competition at all came from petitioners' economist, Dr. Allvine, who gave his opinion as a general proposition, in the abstract, without reference to any relevant market. His opinion was that the type of contracts involved here "greatly reduce competition and the ability of a jobber to seek a new supplier." (Tr. 377-378).

The court of appeals quite properly discounted this testimony because it had no basis in economic fact. (App. 15a, n.26). *American Motor Inns, Inc.* v. *Holiday Inns, Inc.,* 521 F.2d 1230, 1247 (3d Cir. 1975). Opinion evidence like this is not substantial evidence and cannot be accorded any weight in discharging plaintiffs' burden of proving the elements of their claim:

> Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts upon which it is based.

State of Washington v. *United States,* 214 F.2d 33, 43 (9th Cir. 1954). *Accord, Naumkeag Theaters Co.* v. *New England Theaters, Inc.,* 345 F.2d 910, 913 (1st Cir. 1965), *cert. denied,* 382 U.S. 906 (1966); *Ayers* v. *Pastime Amusement Co.,* 283 F.Supp. 773 (D. S.C. 1968). *Galloway* v. *United States,* 319 U.S. 372, 387 (1943) explains the policy:

> No case has been cited and none has been found in which inference, however expert, has been per-

tribution was applied to the detriment of a jobber or retailer. Petitioners' "evidence" regarding industry-wide practices was unsubstantiated by any reference to specific substantive facts.

> mitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand. To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof.

Petitioners rely on *Lessig* v. *Tidewater Oil Company,* 327 F.2d 459, 468 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) for the proposition that data-based economic analysis is not always required. (Petition, pp. 17-18). As the court of appeals stressed (App. 10a-11a), that reliance is misplaced because in *Lessig* the plaintiff proved a relevant market, defendant's market share, the number of stations under substantially similar requirements contracts, the total volume of petroleum products sold through those stations, and the share of the market represented by petroleum sales and the total volume of TBA sales through those stations. When the *Lessig* quotation that petitioners cite (327 F.2d at 468, cited at Petition, p. 17) is placed in context, it is clear that the Ninth Circuit was addressing only the lack of proof of total TBA sales; the court was merely saying, in effect, that proof of violation by exclusive dealing on TBA does not necessarily require proof of the percentage of the TBA market foreclosed when the substantiality of foreclosure in that market can be inferred from other evidence in the case.[19]

[19] If *Lessig* excused an antitrust plaintiff from specifically proving a relevant market and demonstrating economic effects therein, then *Lessig* would be inconsistent with *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977).

That is precisely the kind of economic evidence which petitioners could have developed and offered here. They could have discovered

—the number of Skelly franchise sales agreements in effect with jobbers or dealers;

—the number and location of Skelly financing agreements in effect;

—the geographic areas in which Skelly dealers or jobbers under the franchise or financing agreements actually operated;

—the gallonage volumes (or the dollar value representation thereof) sold by Skelly to jobbers under franchise or financing agreements;

—the gallonage volumes (or dollar value representation thereof) sold by Skelly, within the relevant market, to buyers who were not under franchise or financing agreements;

—the number and identity of suppliers that competed with Skelly in the relevant market;

—the gallonage volumes (or dollar value represented thereby) sold by such competitors in the relevant market;

—the total gallonage volume (or dollar value represented thereby) sold by all suppliers in the relevant market;

—the proportion of any relevant market purportedly affected by any such Skelly agreements.

Here there was no such evidence. In *Standard Oil Co.*, as in *Tampa Electric*, there was specific evidence of all these factors. No market analysis can be made without them.

Granted, such evidence is expensive to discover and develop. But to make antitrust litigation less expensive for plaintiffs is hardly a reason to abandon the economic rationale for the antitrust laws. In any event, antitrust plaintiffs are not prejudiced by the expense, since they recover it, if successful, under § 4 of the Clayton Act, 15 U.S.C. § 15.

CONCLUSION

This case does not meet the standards set by this Court for issuance of a writ of certiorari. There are no special and important reasons for review of the Seventh Circuit decision. There has been no demonstration that the Seventh Circuit failed to apply established antitrust principles to the facts of this case. There is no conflict between circuits on any question presented. For these reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

APPENDIX

Defendant's Exhibit No. 418

Sources: Skelly Oil Company
Wisconsin Department of Revenue

Gasoline Sales Table (Magnus)
(In Thousands)

Year	Magnus	Magnus Others	Magnus Skelly	Magnus % Skelly	Franch. Sales Agrmt.	Subleases
1964	840	272	568	63.6	810,000	100,000
1965	1,057	358	699	66.1	810,000	100,000
1966	1,068	304	764	71.3	701,100	300,000
1967	1,168	436	732	62.6	701,100	300,000
1968	1,102	503	599	54.3	701,100	300,000
1969	1,211	291	920	75.9	701,100	300,000
1970	996	604	392	39.3	701,100	300,000
1971	1,222	566	655	53.6	701,100	300,000
1972	1,895	7	1,888	99.6	701,100	300,000
1973	777	176	601	77.3		
1974	2,224	506	1,718	77.2		
1975	1,928		1,928	100.		
SOURCE	Wis. Tax Reports Chart	Wis. Tax Reports Chart	Wis. Tax Reports; Skelly Oil Co.	Wis. Tax Reports Chart	Feb. 28, 1964 March 1, 1966	100,000 gals. for 3 financed stations